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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 235

[Docket ID: DOD-2013-OS-0220]

RIN 0790-AJ15

Prohibition of the Sale or Rental of Sexually Explicit Material on DoD Property

AGENCY: Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: Proposed rule.

SUMMARY: This rulemaking codifies in the Code of Federal Regulations the policy for restrictions on the sale or rental of sexually explicit materials on property under the jurisdiction of the DoD, or by Service members or DoD civilian employees acting in their official capacities based on 10 U.S.C. 2495b. It also establishes the Resale Activities Review Board (referred to in this rule as the “Board”).

DATES: Comments must be received by **[INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Department of Defense, Office of the Deputy Chief Management Officer, Directorate of Oversight and Compliance, Regulatory and Audit Matters Office, 9010 Defense Pentagon, Washington, DC 20301-9010.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ryan Atkins, 703-588-0619.

SUPPLEMENTARY INFORMATION:

Revisions to the rulemaking will be reported in future status updates as part of DoD's retrospective plan under Executive Order 13563 completed in August 2011. DoD's full plan can be accessed at: <http://www.regulations.gov/#!docketDetail;D=DOD-2011-OS-0036>.

Executive Summary

10 U.S.C. 2495b prohibits the sale or rental of sexually explicit material on property under DoD jurisdiction. The section also requires DoD to establish the Resale Activities Review Board (the Board) to review material offered for sale or rental on property under DoD jurisdiction and to make recommendations to the Secretary of Defense, in accordance with section 2495b. Any material that is determined to be sexually explicit, as defined by section 2495b, is not offered and if materials are already on store shelves, they are removed.

This proposed rule will cost the DoD approximately \$5,500 annually for the life of the rule to manage the Board. It is anticipated that the costs will recur for the life of the proposed rule varying for inflation. 10 U.S.C. section 2495b authorizes Board members travel expenses while away from their homes or regular places of business in the performance of services for the Board. DoD implemented section 2495b by issuing DoD Instruction (DoDI) 4105.70, "Prohibition of the Sale or Rental of Sexually Explicit Material on DoD Property" (the

Instruction). This instruction is available on the Internet from the DoD Issuances Website at <http://www.dtic.mil/whs/directives>. The Instruction established DoD policy that prohibits the sale or rental of sexually explicit material on property under DoD jurisdiction, and no Service member or DoD civilian employee, acting in his or her official capacity, will provide for sale, remuneration, or rental any sexually explicit material to another person. This proposed rule facilitates DoD's compliance with the requirements of 10 U.S.C. 2495b and fulfills the requisite public notification of the DoD process to implement this statutory requirement.

Regulatory Procedures

Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This proposed rule has been designated a “significant regulatory action,” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, this proposed rule has been reviewed by the Office of Management and Budget.

Sec. 202, Public Law 104-4, “Unfunded Mandates Reform Act”

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2014,

that threshold is approximately \$141 million. This proposed rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)

The Department of Defense certifies that this proposed rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

It has been certified that 32 CFR part 235 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, “Federalism”

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule will not have a substantial effect on State and local governments.

List of Subjects in 32 CFR Part 235

Business and industry, Concessions, Government contracts, Military personnel.

Accordingly 32 CFR part 235 is proposed to be revised to read as follows:

**PART 235—PROHIBITION OF THE SALE OR RENTAL OF SEXUALLY EXPLICIT
MATERIAL ON DOD PROPERTY**

Sec.

235.1 Purpose.

235.2 Applicability.

235.3 Definitions.

235.4 Policy.
235.5 Responsibilities.
235.6 Resale Activities Review Board.

Authority: 10 U.S.C. 2495b.

§ 235.1 Purpose.

(a) Pursuant to 10 U.S.C. 2495b and consistent with DoD Instruction 1330.09 “Armed Services Exchange Policy,” (available at <http://www.dtic.mil/whs/directives/corres/pdf/133009p.pdf>), this part establishes policy and assigns responsibilities concerning the prohibition on the sale or rental of sexually explicit materials:

(1) On property under the jurisdiction of the DoD; and

(2) By Service members or DoD civilian employees acting in their official capacities.

(b) Establishes the Resale Activities Review Board (the Board) pursuant to 10 U.S.C. 2495b and consistent with DoD Instruction 5105.18, “DoD Intergovernmental and Intragovernmental Committee Management Program” (available at <http://www.dtic.mil/whs/directives/corres/pdf/510518p.pdf>).

§ 235.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this part as the “DoD Components”).

§ 235.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Dominant theme. A theme of any material that is superior in power, influence, and importance to all other themes in the material combined.

Lascivious. Lewd and intended or designed to elicit a sexual response.

Material. An audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium.

Property under the jurisdiction of the DoD. Includes commissaries, all facilities operated by the Army and Air Force Exchange Service, the Navy Exchange Service Command, the Navy Resale and Services Support Office, and the Marine Corps Exchange; and ship stores.

Sexually explicit material. Material, the dominant theme of which is the depiction or description of nudity, including sexual or excretory activities or organs, in a lascivious way.

§ 235.4 Policy.

It is DoD policy that:

- (a) No sexually explicit material will be offered for sale or rental on property under DoD jurisdiction.
- (b) No Service member or DoD civilian employee, acting in an official capacity, may offer for sale, remuneration, or rental sexually explicit material to another person.

§ 235.5 Responsibilities.

- (a) The Assistant Secretary of Defense for Manpower and Reserve Affairs (ASD(M&RA)), under the authority, direction, and control of the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), and in accordance with DoD Directive 5124.02, “Under Secretary of Defense for Personnel and Readiness (USD(P&R))” (available at <http://www.dtic.mil/whs/directives/corres/pdf/512402p.pdf>) and DoD Directive 5124.09,

“Assistant Secretary of Defense for Readiness and Force Management (ASD(R&FM))”(available at <http://www.dtic.mil/whs/directives/corres/pdf/512409p.pdf>), will:

- (1) Monitor and ensure compliance with this part.
 - (2) Establish the nine-member Board.
 - (3) Appoint six Board members and three alternates in accordance with 10 U.S.C. 2495b and paragraph (a) of § 235.6.
 - (4) Designate one Board member to be the Chair.
 - (5) Monitor the activities of the Board and ensure that the Board discharges its responsibilities as described in § 235.6.
 - (6) Review the Board’s recommendations and make the final determination whether material is sexually explicit, as defined by 10 U.S.C. 2495b.
- (b) Under the authority, direction, and control of the ASD(M&RA), the Deputy Assistant Secretary of Defense for Military Community and Family Policy (DASD(MC&FP)) will:
- (1) Administer the Board and provide military resale policy guidance.
 - (2) Publicize the Board’s recommendations through the Office of the USD(P&R) public website.
- (c) The General Counsel of the Department of Defense will provide legal advice to the Board.
- (d) The Secretaries of the Military Departments will:
- (1) Ensure that their respective Department’s resale activities comply with this part.
 - (2) Each appoint one member to the Board, in accordance with 10 U.S.C. 2495b.
 - (3) Provide nominees to the ASD(M&RA) concerning the six Board members and three alternates appointed by the ASD(M&RA) in accordance with paragraph (a) of § 235.6.
 - (4) Promptly notify the DASD(MC&FP) of a current or projected vacancy on the Board.

(e) The Chief of the National Guard Bureau recommends to the ASD(M&RA) a senior noncommissioned officer for appointment to the Board who will represent the Senior Enlisted Advisor of the National Guard Bureau.

§ 235.6 Resale Activities Review Board.

(a) Composition. The Board will have nine members and three alternates, including at least one member appointed by the ASD(M&RA) with experience managing or advocating for military family programs and who is also an eligible patron of the Defense commissary system and the Defense exchange system.

(1) Board members and alternates will be representatives of the following:

(i) The Senior Enlisted Advisors of the Army, the Navy, the Air Force, Marine Corps, and the National Guard Bureau;

(ii) The Surgeons General of the Army, the Navy, and the Air Force;

(iii) The military community and family programs of the Army, Navy, Air Force, and Marine Corps.

(2) Board members will be senior full-time or permanent part-time DoD civilian employees or active duty Service members not currently assigned to or employed by the Army and Air Force Exchange Service, the Navy Exchange Service Command, or the Marine Corps Exchange Service.

(3) The ASD(M&RA) will appoint one member to be Chair for a 2-year term; the Chair will rotate among the Military Departments.

(4) A vacancy on the Board will be filled in the same manner as the original appointment.

(b) Authorities. (1) The Board has the authority and responsibility to review material offered or to be offered for sale or rental on property under DoD jurisdiction and to recommend to the ASD(M&RA) whether any such material is sexually explicit as defined in 10 U.S.C. 2495b.

(2) If the ASD(M&RA) determines that any material offered for sale or rental on property under DoD jurisdiction is sexually explicit, such material must be withdrawn from all retail outlets where it is sold or rented and returned to distributors or suppliers. Any material that is determined to be sexually explicit will not be offered for sale or rental on property under DoD jurisdiction unless the Board reconsiders the material under paragraph (c)(4) of this section, and the ASD(M&RA) decides that the material is not sexually explicit.

(c) Procedures. (1) The Board will convene at least once a year, and additionally as necessary, to review and make recommendations to the ASD(M&RA) concerning whether any material offered or to be offered for sale or rental on property under DoD jurisdiction is sexually explicit as defined in 10 U.S.C. 2495b. The Board will, to the extent practicable, maintain and update relevant information about Board recommendations.

(2) At the conclusion of the Board's review and the ASD(M&RA) determination, the ASD(M&RA) will issue guidance to the Military Departments for exchange service headquarters, purchasing agents, and managers of retail outlets about the purchase, withdrawal, and return of sexually explicit material. The ASD(M&RA) may also provide guidance to the Military Departments for exchange service headquarters, purchasing agents, and managers of retail outlets about material that he or she has determined is not sexually explicit. Purchasing agents and managers of retail outlets will continue to follow their usual purchasing and stocking practices unless instructed otherwise by the ASD(M&RA).

(3) Any purchasing agent or manager of a retail outlet must request in writing a review from the Board and ASD(M&RA) determination about questionable material either before purchase or as soon as possible if:

(i) He or she has reason to believe that material offered or to be offered for sale or rental on property under DoD jurisdiction may be sexually explicit as defined in 10 U.S.C. 2495b.

(ii) Such material is not addressed by the ASD(M&RA)'s guidance issued in paragraph (c)(2) of this section.

(4) Material determined to be sexually explicit by the ASD(M&RA) may be submitted to the Board for reconsideration every 5 years. If substantive changes in the publication standards occur earlier, the purchasing agent or manager of a retail outlet under DoD jurisdiction may request a review.

(5) The Board will establish procedures for the exchange services to provide material for the Board to review.

Dated: December 15, 2015.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.
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